Nos. 92-264 and 92-280

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARCADIA, OHIO, *et al.*,
Petitioners

v.

OHIO POWER COMPANY, *et al.*,
Respondents

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner

v.

OHIO POWER COMPANY, *et al.*,
Respondents

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE INDIANA MUNICIPAL POWER AGENCY AS *AMICUS CURIAE* IN SUPPORT OF BOTH PETITIONS

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QUESTIONS PRESENTED

1. Whether the court of appeals erroneously interpreted Section 13(b) of the Public Utility Holding Company Act (PUHCA), 15 U.S.C. § 79m(b), to divest the Federal Energy Regulatory Commission (FERC) of jurisdiction under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e, to determine whether it is just and reasonable for a utility that is a subsidiary of a registered holding company to charge wholesale electric customers the entire cost of fuel purchased from an affiliate when lower-cost alternatives are available.

2. Whether the court of appeals erred by failing to defer to FERC's consistent interpretation of its regulation, 18 C.F.R. § 35.14(a)(7), and by construing that regulation to require that all payments by a utility for fuel purchased from an affiliate must be charged to ratepayers, whenever the contract between the utility and its affiliate is subject to the jurisdiction of the Securities and Exchange Commission under PUHCA Section 13(b).

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INTEREST OF THE INDIANA MUNICIPAL POWER AGENCY

Amicus Indiana Municipal Power Agency (IMPA) is a political subdivision of the State of Indiana, pursuant to Ind. Code § 8-1-2.2, that serves as an electric power supply and planning agency for municipalities which own

and operate retail electric distribution systems.[1] IMPA currently consists of 31 Indiana cities and towns, serving approximately 250,000 people.[2] IMPA purchases wholesale electric power from Indiana Michigan Power Company (I&M), which is an operating company subsidiary of the American Electric Power Company, Inc. (AEP). AEP is a registered public utility holding company subject to the jurisdiction of the Securities and Exchange Commission (SEC) under the Public Utility Holding Company Act (PUHCA). I&M's wholesale rates to IMPA are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA). Sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d and 824e, authorize and direct FERC to ensure that wholesale electric rates are just and reasonable.

The opinion below, *Ohio Power Co. v. FERC*, 954 F.2d 779 (D.C. Cir. 1992) (hereinafter *Ohio Power II*), eliminated the authority of FERC to disallow in wholesale rates unjust and unreasonable costs of coal purchased by an operating company subsidiary of AEP, Ohio Power Company (Ohio Power), from a fuel subsidiary. The D.C. Circuit held that Section 13(b) of PUHCA, 15 U.S.C. § 79m(b), deprives FERC of jurisdiction to disallow in Ohio Power's wholesale electric rates the portion of payments to its fuel subsidiary which FERC found to be in excess of the price of comparable coal in the market. The

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[1] Consent of the parties is not required for the filing of this brief, because IMPA is a political subdivision of the State of Indiana, and is represented here by its General Counsel as well as by other counsel (Rule 37.5).

[2] The members of IMPA are the cities and towns of Advance, Anderson, Bainbridge, Bargersville, Centerville, Columbia City, Covington, Crawfordsville, Darlington, Edinburgh, Flora, Frankfort, Frankton, Greendale, Greenfield, Jamestown, Ladoga, Lawrenceburg, Lebanon, Linton, Middletown, Paoli, Pendleton, Peru, Renssalaer, Richmond, Rising Sun, Scottsburg, Tipton, Washington and Waynetown, Indiana.

lower court also held that a FERC fuel adjustment clause regulation, 18 C.F.R. § 35.14(a)(7), requires FERC to treat all of Ohio Power's coal payments to its subsidiary as conclusively just and reasonable, and, therefore, recoverable from ratepayers, because those payments are subject to the SEC's jurisdiction under Section 13(b) of PUHCA. The case was on remand from this Court. *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415 (1990). In *Arcadia*, the Court reversed a previous opinion of the D.C. Circuit, *Ohio Power Co. v. FERC*, 880 F.2d 1400 (D.C. Cir. 1989) (hereinafter *Ohio Power I*). In its earlier decision, the lower court had held that Section 318 of the FPA, 16 U.S.C. § 825q, deprived FERC of jurisdiction to issue its order. IMPA participated as *amicus curiae* in this Court, supporting reversal of *Ohio Power I*.

Inter-affiliate transactions can be a sizable component of the costs of operating subsidiaries of public utility holding companies. For example, AEP, through its operating companies, has invested not only in affiliate coal mining operations, but also in related fuel supply equipment and facilities, including a fleet of river towboats and approximately 500 coal barges;[3] more than 3,000 rail-hopper cars for transporting coal; and a rail-to-barge coal transfer terminal on the Ohio River with the capacity to transfer approximately 15,000,000 tons of coal annually.[4] As a purchaser of electricity from an operating company subsidiary of a registered public utility holding company, IMPA has a direct interest in preventing the imposition of unwarranted restrictions upon FERC's ability to regulate for the protection of consumers the wholesale electric rates of such operating company subsidiaries.

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[3] *Indiana and Michigan Electric Co., et al.*, HCAR No. 24039, 35 S.E.C. Docket 207, 208 (March 4, 1986).

[4] *Indiana and Michigan Municipal Distributors Ass'n v. Indiana Michigan Power Co.*, 51 F.E.R.C. ¶ 63,019, at 65,080 (1990) (Initial Decision), *exceptions pending on other grounds.*

IMPA currently is involved in litigation before FERC regarding, *inter alia*, the reasonableness of I&M's inclusion in its wholesale electric rates of amounts associated with purchases of coal and coal transportation services from affiliates and from a non-affiliated company. In Phase II of that litigation, a FERC Administrative Law Judge (ALJ) has ruled that a portion of payments made by I&M under contracts to purchase coal should be disallowed as unreasonable. To accomplish this disallowance, the ALJ ordered I&M to reduce its rates to its wholesale electric customers by $25 million. *Indiana and Michigan Municipal Distributors Ass'n v. Indiana Michigan Power Co.*, 51 F.E.R.C. at 65,090. In addition, the ALJ found that I&M's payments to an affiliate for the capital costs of the AEP rail-to-barge coal transfer facility allocated an excessive share of the costs of that facility to I&M's ratepayers. He ordered I&M to charge its wholesale customers only for that portion of the facility that it actually uses. *Id.* at 65,098. Exceptions to the ALJ's decision are pending before FERC. Prior to this Court's decision in *Arcadia*, I&M argued that *Ohio Power I* immunized I&M's costs from the ALJ's scrutiny and order. Subsequent to the issuance of *Ohio Power II*, the Chairman of FERC stated in a letter to Congressman Sharp of Indiana:

> If the D.C. Circuit's latest opinion is left unchanged, it is conceivable that the Commission may be without jurisdiction to resolve the issues in Phase II.

App., *infra*, 3a.[5] Although IMPA does not necessarily agree that *Ohio Power II* deprives FERC of jurisdiction to affirm the ALJ's decision against I&M or to provide additional relief, IMPA has a direct interest in seeking review by this Court of the lower court's opinion.

[5] The Appendix to this brief reproduces the April 9, 1992, letter from FERC Chairman Martin L. Allday, to the Honorable Philip R. Sharp of the House of Representatives. A copy of the letter is in the public file in FERC Docket Nos. EL88-1-000, ER88-31-000 and ER88-32-000 (Phase II) in FERC's Office of Public Information.

REASONS FOR GRANTING THE PETITIONS

1. The lower court's ruling that Section 13(b) of PUHCA limits FERC's jurisdiction to disallow in wholesale electric rates the costs of unjust and unreasonable inter-affiliate transactions violates this Court's mandate in *Arcadia*. The lower court acted beyond the scope of the remand, and its ruling is inconsistent with *Arcadia*'s holdings and reasoning. As in *Ohio Power I*, the lower court has upset half a century of decisionmaking by FERC and its predecessor, the Federal Power Commission (FPC), *and* by the SEC. Moreover, the lower court erroneously applied this Court's precedents on Federal preemption in electric ratemaking.[6]

a. In the D.C. Circuit's first opinion, a majority of a three-judge panel held that FERC was divested of jurisdiction to regulate Ohio Power's wholesale rates, insofar as they included the cost of coal purchased from its affiliate, Southern Ohio Coal Company (SOCCO), by Section 318 of the FPA. The panel majority held that Section 318 ousted FERC of jurisdiction under the FPA over any "subject matter" which was subject to SEC regulation under PUHCA. *Ohio Power I*, 880 F.2d at 1405-06, 1408. The panel majority also held that when FERC disallowed a portion of the price paid by Ohio Power to SOCCO, it was regulating the same subject matter as Section 13(b) of PUHCA: "[t]he price term of sales contracts between associated companies." *Id.* at 1406. Relying on a broad reading of Section 13(b) as delegating to the SEC the task of "regulating the terms of affiliate contracts in the interest of consumers, as well as investors and the public" (*id.*), the court concluded, analogizing to this Court's holding that state retail ratemaking agencies may not "trap" costs of wholesale transactions subject to FERC's juris-

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[6] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

diction, that an absolute bar on FERC's jurisdiction was intended by the statute (*id.* at 1406, 1408-10).

In *Arcadia*, this Court reversed the lower court's reading of Section 318 as "a general conflicts provision, policing the entire regulatory border between the two agencies." 111 S. Ct. at 421 (footnote omitted). The Court held that the phrase "or any other subject matter" in Section 318 belongs to the fourth and final category of subjects as to which SEC jurisdiction under PUHCA prevails over conflicting FERC jurisdiction under the FPA: "the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." *Id.* at 419. The Court observed that "[PUHCA and the FPA] subject[] some companies that transmit and distribute electric power to overlapping regulatory jurisdiction of both the SEC and of FERC." *Id.* at 417. Section 318 contains a "careful enumeration of subjects" (*id.* at 419), with the intent of resolving jurisdictional conflicts "within four areas of plainly parallel authority granted both to the SEC, under PUHCA, and to the FPC (FERC), under the FPA" (*id.*). These "areas of plainly parallel authority" do not include Section 13(b) of PUHCA *or* Sections 205 and 206 of the FPA. *Id.* at 419-20. Moreover, the Court specifically held that when FERC disallowed in Ohio Power's rates a portion of the price it paid to SOCCO for coal, it was *not* regulating the same "subject matter" as Ohio Power's acquisition of SOCCO or of coal (*id.* at 422 & n.3), even if Section 318 were construed as applying to requirements "imposed 'with respect to the disposition' of electric power" (*id.* at 422).

The Court then remanded for the lower court to consider

> the argument that the FERC-prescribed rate is not "just and reasonable" because it "traps" costs which the government itself has approved—disregarding a governmental assurance, possibly implicit in the SEC approvals, that Ohio Power will be permitted to recoup the cost of acquiring and operating SOCCO.

Id. (citation omitted).

On remand, the same panel of the lower court adhered to its view that in Section 13(b) of PUHCA, "Congress has granted the SEC alone the authority to establish prices charged by [registered holding company] associates for goods." *Ohio Power II*, 954 F.2d at 786 (Arcadia Pet. App., 14a).[7] The court reiterated its earlier conclusion that FERC ratemaking is regulation of the same subject matter that is delegated to the SEC by Section 13(b): "the economic relationship between Ohio Power and SOCCO," *id.* at 784 (Arcadia Pet. App., 11a), and that the only way to prevent the "trapping" of costs is to construe Section 13(b) as ousting FERC of ratemaking jurisdiction under FPA Sections 205 and 206:

> [W]e hold that Congress in § 13(b) of the PUHCA authorized the SEC to set the price of SOCCO coal "at cost," and in so doing constrained FERC from altering that price under its "just and reasonable" rate-setting authority.

Id. at 785 (Arcadia Pet. App., 12a).

The lower court simply failed to address the question posed to it by this Court: whether "the FERC-prescribed rate is not '*just and reasonable*' because it 'traps' costs which the government itself has approved." *Arcadia*, 111 S. Ct. at 422 (emphasis supplied). On remand, the lower court should have considered whether FERC gave appropriate weight to Ohio Power's legitimate expectations in light of the actual scope of the SEC's review of its activities. Of course, FERC's ratemaking determinations under FPA Sections 205 and 206 must be supported by substantial evidence of record[8] and must not be arbi-

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[7] In *Ohio Power I*, Judge Mikva disagreed with the majority's jurisdictional ruling, but concurred in the judgment because he concluded that FERC had violated one of its fuel adjustment clause regulations. 880 F.2d at 1410-14. In *Ohio Power II*, however, the panel's opinion was unanimous.

[8] Section 313(b) of the FPA, 16 U.S.C. § 825*l*(b).

trary or capricious or an abuse of discretion.[9] Instead of reviewing FERC's setting of just and reasonable rates under these well-established principles of administrative law, the lower court construed another statute to "constrain[] FERC from altering [the] price [paid by Ohio Power to SOCCO] under its 'just and reasonable' rate-setting authority." *Ohio Power II*, 954 F.2d at 785 (Arcadia Pet. App., 12a).

Having concluded that FPA Section 318 did not limit FERC's jurisdiction to determine the extent to which it would be just and reasonable to include in wholesale electric rates Ohio Power's payments to SOCCO, this Court did not remand the case to the D.C. Circuit to consider whether FERC should be ousted of ratemaking jurisdiction by means of a different statutory provision. The lower court declared that its reading of PUHCA Section 13(b) as limiting the reach of FPA Sections 205 and 206, like its reading of FERC's fuel adjustment clause regulation,[10] "provides Ohio Power with . . . succor from the 'overlapping regulatory jurisdiction of both the SEC and of FERC' found by the *Arcadia* Court." 954 F.2d at 784 (Arcadia Pet. App., 10a) (quoting *Arcadia*, 111 S. Ct. at 415). This Court, however, did not hold that the "overlapping regulatory jurisdiction" created by Congress was a *problem*, to be resolved by ousting FERC of ratemaking jurisdiction over the inclusion of costs of inter-affiliate transactions in electric rates. To the contrary, *Arcadia* held that ratemaking regulation of Ohio Power is not regulation of the same subject matter as Ohio Power's acquisition of SOCCO or its purchase of coal from SOCCO. 111 S. Ct. at 422 & n.3. *See also id.* at 423 (Stevens, J., concurring) ("The [SEC's and FERC's] requirements limit Ohio Power's financial relationships

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[9] Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

[10] *See* pages 16-18, *infra*.

with different parties—its supplier and its customers. The two requirements also concern different aspects of fuel costs—the amount Ohio Power must pay for its fuel and how much of those fuel costs it can recover directly from its customers.").

b. The lower court's interpretation of PUHCA Section 13(b) undermines this Court's interpretation of FPA Section 318, which is the one provision in the Public Utility Act of 1935 that expressly addresses "[c]onflict[s] of [j]urisdiction" (16 U.S.C. § 825q) between the SEC and FERC. *Arcadia* established that Section 318 is not "a general conflicts provision, policing the entire regulatory border between the two agencies," 111 S. Ct. at 421 (footnote omitted), and that it does not limit FERC ratemaking jurisdiction in the event of alleged conflicts with SEC jurisdiction under PUHCA Section 13(b). Although the lower court claimed it was relying on "the plain language" of Section 13(b),[11] that provision, unlike FPA Section 318, makes no mention of FERC jurisdiction. Moreover, the language of PUHCA Section 13(b) is very different from the language of FPA Sections 205 and 206. The latter provisions articulate a comprehensive ratemaking scheme; Section 13(b) does not. *Compare* 16 U.S.C. §§ 824d and 824e *with* 15 U.S.C. § 79m(b). The lower court's statutory interpretation actually is premised on its policy determination that "the economic relationship between Ohio Power and SOCCO" should be regulated by one rather than two federal agencies. 954 F.2d at 784 (Arcadia Pet. App., 11a). This was the same policy on which the court previously relied for its expansive application of Section 318 to the FERC order at issue. *Ohio Power I*, 880 F.2d at 1406, 1408-10.

The lower court's sweeping approach to statutory interpretation, unless reversed, would render this Court's interpretation of Section 318 a nullity. In *Arcadia*, the

[11] *Ohio Power II*, 954 F.2d at 784 (Arcadia Pet. App., 11a).

Court rejected the ruling in *Ohio Power I* that the words "or any other subject matter" in Section 318 constituted a catch-all category, because this would "render[] the section's careful enumeration of subjects superfluous." 111 S. Ct. at 419. Yet, the lower court has now relied on its own policy judgment to supplement Section 318 with an additional limit on FERC's jurisdiction. A statutory scheme of overlapping SEC and FERC jurisdiction in which the SEC's jurisdiction is stated to be paramount as to several "careful[ly] enumerat[ed] . . . subjects," *id.*, does not permit lower courts to imply, on the basis of their policy preferences, additional limits on the jurisdiction of one agency.

c. In *Arcadia*, the Court adopted a reading of Section 318 which was "confirmed by long-time understanding and practice" (111 S. Ct. at 420), including 50 years of FPC and FERC decisions under that provision (*id.* at 420-21). *Ohio Power II*'s holding that PUHCA Section 13(b) divests FERC of ratemaking authority under FPA Sections 205 and 206 is as inconsistent with the half century of agency administration of those provisions as was *Ohio Power I*'s interpretation of Section 318. IMPA's counsel are aware of no FERC, FPC or SEC decisions which have interpreted Section 13(b) or Sections 205 and 206 as they have now been interpreted on remand. All of the cases are to the contrary.

Prior to the development of the market-price test that was applied to Ohio Power, FERC's predecessor, the FPC, required public utilities to eliminate from their books and their rates excessive payments made to supplier affiliates. The FPC's "no profits to affiliates" rule was applied to operating utilities within holding company systems, even though sales to such utilities by affiliated service companies and fuel suppliers were subject to regulation by the SEC under PUHCA. *E.g., California Oregon Power Co. v. FPC*, 150 F.2d 25, 27-28 (9th Cir. 1945), *cert. denied*, 326

U.S. 781 (1946).[12] In *McDowell County Consumers Council, Inc. v. American Electric Power Co.*, 54 F.P.C. 361, 364 (1975), the FPC instituted an investigation into "[t]he reasonableness and prudence of AEP's and its affiliate's coal purchase policies and practices as well as all factors influencing or affecting the delivered price of coal" whether purchased from affiliates or non-affiliates. The FPC stated (*id.* at 363):

> APCO [Appalachian Power Company, an AEP operating company subsidiary] contends that the prices charged for coal by affiliated companies is [sic] subject to the regulation of the SEC. The investigation herein instituted is for the purpose of fulfilling this Commission's statutory obligation as expressed [*inter alia*] in Sections . . . 205 [and] 206 . . . of the Federal Power Act which are in no way repugnant to the exercise of any authority which the SEC may choose to assert under its statute.

In a 1975 letter, Chairman Nassikas of the FPC responded to inquiries by the Chairmen of two Subcomittees of the Senate Committee on Government Operations, regarding the respective jurisdictions of the FPC and the SEC "where owned or controlled fuel sources exist within a registered public utility holding company system." *The Utilities Act of 1975: Hearings on S. 594 Before the Subcomm. on Intergovernmental Relations and the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 500, 515 (1975) (letter of FPC Chairman John N. Nassikas to Senator Lee Metcalf dated May 15, 1975). Chairman Nassikas specifically noted, as an example, the captive coal mining operations of Ohio Power and other

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[12] The FPC originally developed the "no profits to affiliates" rule in the early 1930's, in regulating hydroelectric licenses under the Federal Water Power Act of 1920 (now Part I of the FPA). After the enactment of the Public Utility Act of 1935, the FPC applied this rule to the regulation of interstate electric utilities. *California Oregon Power Co. v. FPC*, 150 F.2d at 27.

AEP operating company subsidiaries. *Id.* at 516-17. He explained the respective jurisdictions of the FPC and SEC as follows:

> Concerning fuel prices from owned or controlled coal producing subsidiaries or affiliates, *the SEC exercises threshold jurisdiction of a transactional nature.* That is the SEC, pursuant to Section 13(b) of the PUHC Act, 15 U.S.C. 79m(b), is authorized to prescribe rules and regulations which permit the creation of and contracting by fuel producing subsidiaries within the holding company system.
>
> * * * *
>
> The SEC does not regard its authority as extending to regulation of the rates charged by a utility company for the electricity it sells at retail or wholesale, and accordingly *does not prescribe what effect shall be given, through a fuel adjustment clause or otherwise, to the elements of cost in the intercompany transactions determined under the PUHC Act.* Fuel costs for ratemaking purposes are governed by the relevant state and federal rate regulatory agencies, including this Commission.
>
> I must emphasize that this Commission and SEC have long endeavored to resolve conflict of jurisdiction issues on an informal basis. *This inter-agency cooperation is indicative of the mutual respect for the relative expertise which our two sister agencies hold for one another.*

Id. at 517-19 (emphasis supplied; footnote omitted).

Chairman Nassikas' statements about the SEC's views of its jurisdiction are consistent with the SEC's orders and decisions. That agency has concluded that its jurisdiction to approve requests to establish or reorganize fuel supplier affiliates does not affect the jurisdiction of FERC or the FPC (or the jurisdiction of the appropriate state retail ratemaking authority) to protect ratepayers from excessive inter-affiliate fuel prices. *E.g., Central and South West Fuels, Inc.*, HCAR No. 23876, 34 S.E.C.

Docket 500, 503 (Oct. 23, 1985). The SEC has observed that interested parties could seek relief under Section 13(b) in the future from above-cost prices paid to affiliates for coal, *or* petition the appropriate ratemaking authorities to scrutinize the inter-affiliate transactions in setting rates, *or* both. *The North American Co.*, 29 S.E.C. 521, 537 n.26 (1949); *Appalachian Electric Power Co.*, 27 S.E.C. 1029, 1034-35 (1948). *See also Georgia Power Co.*, HCAR 23448, 31 S.E.C. Docket 621, 623, 624 (Oct. 10, 1984) (SEC jurisdiction under Section 13(b) over inter-affiliate supply of construction services did not limit review of retail rates by the Georgia Public Service Commission).

The lower court has suggested that FERC jurisdiction to disallow a portion of the payments to SOCCO in Ohio Power's rates would exist, if at all, only if the SEC had granted an exemption under Section 13(b). 954 F.2d at 785 n.5 (Arcadia Pet. App., 12a); *see also Ohio Power I*, 880 F.2d at 1407, 1408. However, in *New England Electric System*, HCAR 22309, 24 S.E.C. Docket 298 (Dec. 9, 1981), the SEC concluded that it could exempt a proposed joint venture to construct and operate coal transportation facilities from Section 13(b) without harming consumers because FERC's ratemaking authority was *independent* of Section 13(b). 24 S.E.C. Docket at 307-08. The SEC stated that FERC had the authority to "include the entire cost of transportation . . . , if FERC should determine that it is just and reasonable, or some other amount." *Id.*[13]

Even as to subject matters which are within the scope of FPA Section 318—security issuances and other securities transactions, and acquisitions and dispositions of facilities and other assets by and among registered holding

[13] The lower court misread this case when it concluded, in *Ohio Power I*, that in *New England Electric System* the SEC may have been stating that FERC would have jurisdiction *because* the SEC was granting a Section 13(b) exemption. 880 F.2d at 1407.

company affiliates [14]—the SEC has recognized that PUHCA was not intended to supplant FERC's responsibility to ensure that rates reflect only the costs of reasonable utility operations. For instance, the SEC frequently has declared that the reasonableness of a construction program or of a particular allocation of construction costs among operating utilities is a matter within the jurisdiction and expertise of the FPC/FERC (or the appropriate state commission, with regard to a utility's retail rates). *Georgia Power Co.*, 31 S.E.C. Docket at 624; *Georgia Power Co.*, HCAR No. 23330, 30 S.E.C. Docket 934, 935-36 (June 15, 1984); *The Southern Company*, HCAR No. 21665, 20 S.E.C. Docket 799, 801-02 (July 24, 1980); *Georgia Power Co.*, HCAR No. 18750, 5 S.E.C. Docket 24, 25 (Dec. 31, 1974). *See Arcadia*, 111 S.Ct. at 423 (Stevens, J., concurring) (discussing the SEC's and FERC's respective fields of expertise).

d. Even apart from its inconsistency with *Arcadia* and with SEC and FERC/FPC administration of PUHCA and the FPA, the lower court's opinion should be reviewed because it has misapplied the "field preemption" rule promulgated by this Court in *Nantahala Power & Light v. Thornburg* and *Mississippi Power & Light v. Mississippi*, *supra* note 6. Those cases teach that a state is preempted from disallowing, in retail rates, the price of wholesale electric power, and power costs allocated among affiliated companies by means of wholesale power agreements, because those costs are regulated by FERC, a Federal *ratemaking* agency, under the FPA. The SEC's role under PUHCA is not analogous to FERC's role under the FPA. In the Public Utility Act of 1935, Congress delegated to FERC (then the FPC) jurisdiction over wholesale electric rates and services. Although jurisdiction over retail electric rates and services was left to the states, they were not authorized to disallow costs already subject to FERC's ratemaking jurisdiction at a

[14] *Arcadia*, 111 S. Ct. at 419-20.

prior stage of the economic process of producing, transmitting and distributing electricity. The SEC, by contrast, is not a ratemaking agency.[15] *Ohio Power II* has turned *Nantahala* and *Mississippi* on their heads by reducing FERC's role from preeminent regulator of electric rates and services to a litigant in proceedings before the SEC. The lower court dismissed Justice Stevens' concerns about a regulatory gap[16] by declaring that "FERC may attempt to affect the price-approval process" by submitting comments in SEC proceedings or by petitioning the SEC to initiate an investigation. 954 F.2d at 786 (Arcadia Pet. App., 14a). Such a drastic restructuring of the regulatory process hardly is required to protect the legitimate expectation interests of Ohio Power and of AEP investors. FERC's statutory mandate to ensure that utility rates are just and reasonable obligates it to balance the interests of consumers and investors. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1949). Ratemaking decisions of FERC can be reviewed by the courts to ensure that they are supported by substantial evidence and are not arbitrary or capricious or an abuse of discretion. 16 U.S.C. § 825*l*(b); 5 U.S.C. § 706(2)(A).

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[15] FERC's exclusive jurisdiction over wholesale electric transactions is established by the "filed rate doctrine," which provides that a FERC-filed tariff for wholesale electric rates binds the affected utilities, and state and Federal governmental bodies (including FERC itself), unless and until the tariff is modified by FERC. *Nantahala Power & Light v. Thornburg*, 476 U.S. at 962-67; *Mississippi Power & Light v. Mississippi*, 487 U.S. at 371-72. The filed rate doctrine is inapplicable to Section 13(b) of PUHCA. That provision, and the SEC's rules, do not establish a system of filed tariffs and rate review. *Ohio Power I*, 880 F.2d at 1408. By contrast, the FPA requires utilities to file tariffs specifying their wholesale electric rates and services, and all contracts affecting those rates and services. 16 U.S.C. § 824d(c) and (d). The FPA also provides for public notice, FERC review of the reasonableness of tariffs and contracts filed, and refund protection from excessive rates. 16 U.S.C. §§ 824d(e) and 824e.

[16] *Arcadia*, 111 S. Ct. at 423-24.

2. An independent ground for the lower court's decision to vacate the FERC order under review was its interpretation of FERC's fuel adjustment clause regulation, 18 C.F.R. § 35.14(a)(7). IMPA concurs with the petitioners that this ruling should not insulate the lower court's jurisdictional holding from review. IMPA also agrees with the petitioners that the court's interpretation of Section 35.14(a)(7) is erroneous and presents independent grounds for the issuance of a writ of certiorari.

Section 35.14(a)(7) provides, *inter alia*:

> Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause.

The lower court rejected FERC's contention that that word "deemed" was meant to be a rebuttable rather than conclusive presumption, even though FERC and the FPC have consistently adopted that interpretation in their administration of the regulation. The court reasoned that "deemed" was unambiguous because "courts construing the word 'deemed' have *generally* found that it establishes a conclusive presumption." *Ohio Power II*, 954 F.2d at 783 (Arcadia Pet. App., 8a), quoting *Ohio Power I*, 880 F.2d at 1413 (Mikva, J., concurring in the judgment) (emphasis supplied). This reasoning is a *non sequitur*. There is no black-letter rule of law that "deemed" *always* creates a conclusive or irrebutable presumption.

> The words "deem" and "deemed" when used in statutes have been construed to establish a conclusive presumption in some instances, but only a rebuttable presumption in other cases, depending largely upon the context in which they are used.

Brimm v. Cache Valley Banking Co., 269 P.2d 859, 863 (Utah 1954) (citation omitted). How courts *generally* construe the word "deemed" does not justify forcing on

FERC an interpretation of one of its own regulations which flies in the face of the agency's consistent administration of that regulation.

The agency interpretation rejected by the lower court is no recent invention. Less than a year after the regulation was promulgated by FPC Order No. 517,[17] the FPC initiated an investigation of allegations that an operating subsidiary of AEP was passing excessive inter-affiliate fuel costs through its fuel adjustment clause. *McDowell County Consumers Council, Inc. v. American Electric Power Co., supra.* The FPC declared that the investigation would include inter-affiliate purchases which its recently-enacted regulation had "deemed" reasonable: "The coal contracts subject to this investigation shall include all coal contracts whether or not required to be submitted pursuant to Commission Order No. 517." 54 F.P.C. at 365 n.4.[18] The FPC also distinguished its obligation under FPA Sections 205 and 206 from SEC regulation under PUHCA. *Id.* at 363.

In a letter responding to inquiries from two Senate Subcommittes, FPC Chairman Nassikas—who also was Chairman when the fuel clause regulation was promulgated in 1974 [19]—stated that Section 35.14(a)(7) creates a "presumption of reasonableness as to [the] price [of fuel]" when the price is subject to the jurisdiction of another agency. *The Utilities Act of 1975: Hearings on S. 594 Before the Subcomm. on Intergovernmental Relations and the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Opera-*

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[17] *Fuel Adjustment Clauses in Wholesale Rate Schedule*, 52 F.P.C. 1304 (1974).

[18] 18 C.F.R. § 35.14(a)(7), promulgated by FPC Order No. 517, requires that affiliate fuel contracts be filed with the FPC (now FERC) when they are not subject to other regulatory authority.

[19] *Fuel Adjustment Clauses in Wholesale Rate Schedule*, 52 F.P.C. at 1304.

tions, at 514. In his concurrence to the judgment reversed in *Arcadia*, Judge Mikva stated that Chairman Nassikas' letter did not "specify[] whether the presumption is rebuttable or conclusive." 880 F.2d at 1414. However, Chairman Nassikas referred, in the same letter, to the allegations of excessive inter-affiliate coal purchases by the AEP system which the FPC was investigating. *Hearings* at 506. He also referred to the SEC's jurisdiction under PUHCA Section 13(b) as "threshold jurisdiction of a transactional nature," *id.* at 517, and added:

> The SEC does not regard its authority as extending to the regulation of the rates charged by a utility company for the electricity it sells at retail or wholesale, and accordingly does not prescribe what effect shall be given, through a fuel adjustment clause or otherwise, to the elements of cost in the intercompany transactions determined under the PUHC Act. Fuel costs for ratemaking purposes are governed by the relevant state and federal rate regulatory agencies, including this Commission.

Id. at 518. Thus, when it promulgated the regulation, the FPC could not have thought that it was establishing a conclusive presumption that transactions were reasonable if they were subject to SEC regulation under PUHCA.

Finally, IMPA submits that the Commission's ability to amend its regulation in the future, if this Court reverses the lower court's jurisdictional holding, would provide inadequate protection from excessive costs of inter-affiliate transactions. Unless the lower court's interpretation of Section 35.14(a)(7) as currently written is reversed, future amendment of the regulation would not protect utility customers from excessive fuel costs that had been charged to them in the meantime.

CONCLUSION

The petitions of Arcadia, Ohio, *et al.* and of the Federal Energy Regulatory Commission for writs of certiorari should be granted.

Respectfully submitted,

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